Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

74-1536

IN THE

# Supreme Court of the United States

No. ..... ..... TERM, 1975

FRANK BRUNO,
Petitioner
v.
UNITED STATES OF AMERICA,
Respondent

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS


| | PAGE |
|---|---|
| Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit | 1 |
| Opinions Below | 2 |
| Jurisdiction | 3 |
| Question Presented | 4 |
| Constitutional Provisions Involved | 5 |
| Federal Statute Involved | 8 |
| Statement of the Case | 10 |
| Reasons for Granting the Writ | 11 |
| Conclusion | 21 |
| Appendix A—Judgments Below | |
| (1) Original Judgment Order of Court of Appeals | 1a |
| (2) Order of Court of Appeals Sur Petition for Rehearing | 3a |
| Appendix B—Certificate of Service | 4a |

*Table of Contents.*

PAGE

TABLE OF CITATIONS

CASES PAGE

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 85 S.Ct. 348 (1964) ..... 19

Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23 (1824) ..13, 20

Katzenbach v. McClung, 379 U.S. 294, 85 S.Ct. 377 (1964) ..... 18

McCulloch v. Maryland, 4 Wheat 316, 4 L. Ed. 579 (1819) ..... 12

National Labor Relations Board v. Jones and Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615 (1937) ..... 20

Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837 (1935) ..... 20

Perez v. United States, 402 U.S. 146, 91 S.Ct. 1357 (1971) ..... 14

United States v. Harris, 460 F. 2d 1041 (5th Cir. 1972); cert. denied 409 U.S. 877, 93 S.Ct. 128 .. 19

UNITED STATES CONSTITUTION

Amendment IX .....11, 13, 14, 21

Amendment X .....passim

Article I, Section 8 .....passim

STATUTES

18 United States Code, Section 1511 .....passim

OTHER SECONDARY SOURCES

Black's Law Dictionary, 4th Ed. Rev (1968) ..... 16

H.R. Rep. No. 91-1549, 91st Cong. 2d Sess (1970); 2 U.S. Code Cong. & Admin. News 1970 .....16, 17

IN THE

# Supreme Court of the United States

No. ..... ..... TERM, 1975

FRANK BRUNO,
Petitioner
v.
UNITED STATES OF AMERICA,
Respondent

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Frank Bruno, your petitioner, prays that a Writ of Certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit entered in the above entitled case on February 5, 1975, and the Order denying the Petition for Rehearing dated May 9, 1975.

## OPINIONS BELOW

No opinions were rendered by the United States Court of Appeals for the Third Circuit in this matter. The Court's Judgment Order affirming the conviction and judgment in the District Court is reported at 511 F. 2d 1396 (3rd Cir. 1975) and is set forth herein at Appendix A(1). The Court's Order denying the Petition for Rehearing is not yet reported but is set forth herein at Appendix A(2).

No opinions were rendered by the United States District Court for the Western District of Pennsylvania in this matter.

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## JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit (Appendix A(1)) was entered on February 5, 1975. A timely Petition for Rehearing was denied (Appendix A(2)) on May 9, 1975. Pursuant to Rule 22 of the Rules of this Honorable Court, the within Petition for Writ of Certiorari is being filed within thirty (30) days after the entry of the Court of Appeals' final order.

The jurisdiction of this Honorable Court is invoked under 28 United States Code §1254(1).

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## QUESTION PRESENTED

Whether 18 United States Code, Section 1511 is unconstitutional on its face because the power to prohibit a conspiracy to obstruct the enforcement of the criminal laws of a State or political subdivision thereof with the intent to facilitate an illegal gambling business is a power reserved to the States by the Ninth and Tenth Amendments to the United States Constitution and is not a power delegated to Congress under Article I, Section 8 of the Constitution?

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## CONSTITUTIONAL PROVISIONS INVOLVED

The Ninth Amendment to the Constitution of the United States provides as follows:

> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

The Tenth Amendment to the Constitution of the United States provides as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Article I, Section 8 of the Constitution of the United States provides as follows:

> The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States:
>
> To borrow money on the credit of the United States:
>
> To regulate commerce with foreign nations, and among the several states, and with the Indian tribes:
>
> To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States:

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures:

To provide for the punishment of counterfeiting the securities and current coin of the United States:

To establish post-offices and post-roads:

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries:

To constitute tribunals inferior to the supreme court:

To define and punish piracies and felonies committed on the high seas, and offences against the law of nations:

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water:

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years:

To provide and maintain a navy:

To make rules for the government and regulation of the land and naval forces:

To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions:

To provide for organizing, arming and disciplining the militia, and for governing such part of them



as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress:

To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings: And,

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

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## FEDERAL STATUTES INVOLVED

Title 18, United States Code, Section 1511 provides as follows:

§ 1511. OBSTRUCTION OF STATE OR LOCAL LAW ENFORCEMENT

(a) It shall be unlawful for two or more persons to conspire to obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business if—

(1) one or more of such persons does any act to effect the object of such a conspiracy;

(2) one or more of such persons is an official or employee, elected, appointed, or otherwise, of such State or political subdivision; and

(3) one or more of such persons conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in



excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels, or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization, except as compensation for actual expenses incurred by him in the conduct of such activity.

(d) Whoever violates this section shall be punished by a fine of not more than $20,000 or imprisonment for not more than five years, or both. Added Pub.L. 91-452, Title VIII, § 802(a), Oct. 15, 1970, 84 Stat. 936.

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## STATEMENT OF THE CASE

On April 10, 1974, your petitioner, Frank Bruno, was indicted at criminal number 74-109 in the United States District Court for the Western District of Pennsylvania. The federal grand jury charged that Petitioner conspired to obstruct the enforcement of the criminal laws of the Commonwealth of Pennsylvania with the intent to facilitate an illegal gambling business in violation of 18 United States Code, Section 1511. A jury trial was convened before the Honorable Gerald J. Weber, District Judge, on June 19, 1974. On June 25, 1974, the jury returned a verdict of guilty as to Petitioner.

Motions for new trial, arrest of judgment and judgment of acquittal were filed by Petitioner. Said motions were denied by Judge Weber on July 10, 1974. Also on that day, Petitioner was sentenced to serve a prison term of two years and to pay the costs of prosecution. A timely Notice of Appeal from the judgment of sentence was filed in the United States Court of Appeals for the Third Circuit on July 19, 1974. After briefs were filed and oral argument concluded, that Court, by Judgment Order dated February 5, 1975, affirmed the judgment of the District Court. A Petition for Rehearing was denied on May 9, 1975. The within Petition for Writ of Certiorari followed.

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## REASONS FOR GRANTING A WRIT OF CERTIORARI

Petitioner contends that 18 U.S.C. §1511 is unconstitutional on its face because the power to prohibit a conspiracy to obstruct the enforcement of the criminal laws of a State or political subdivision thereof with the intent to facilitate an illegal gambling business is a power reserved to the States by the Ninth and Tenth Amendments to the United States Constitution and is not a power delegated to Congress under Article I, Section 8 of the Constitution. Petitioner elects to present the reasoning that underlies this contention by way of a series of interrelated, dependent premises which will lead progressively to the conclusion urged upon this Honorable Court. This quasi-syllogistic method is employed because the conclusion is more readily evident when it follows naturally from a chain of certain basic legal principles.

**A.**

**There are acts beyond the scope of Congressional powers specifically set forth in Article I, Section 8 of the United States Constitution.**

It is well recognized that ours is a government of delegated powers. At the outset, restraints were placed upon the power of the legislative as well as the other branches of government; clearly, the power of Congress has always been limited. As Mr. Chief Justice Marshall explained over 150 years ago in the landmark case of *McCulloch v. Maryland,* 4 Wheat. 316, 4 L. Ed. 579 (1819):

> *"This government is acknowledged by all to be one of enumerated powers.* The principle, that it can exercise only powers granted to it, would seem too apparant to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted." (Emphasis supplied.)



**B.**

**Any powers not delegated to Congress by the Constitution, nor prohibited by it to the states, are reserved to the states or to the people.**

Support for the above stated legal principle can be found in the language of the Ninth and Tenth Amendments to the United States Constitution. The Ninth Amendment states:

> "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

The Tenth Amendment states:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The interpretation of these constitutional provisions and their effect on the structure and operation of our government was early established by this Court in *Gibbons v. Ogden,* 9 Wheat 1, 6 L.Ed. 23 (1824). There, Mr. Chief Justice Marshall announced:

> "The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government." 9 Wheat at 195.

**C.**

**The power to prohibit the obstruction of the enforcement of the criminal laws of a state, without more, is a power reserved to the states under the Tenth Amendment, and not a power delegated to Congress under Article I, Section 8 of the United States Constitution.**

Petitioner contends that the power to prohibit the obstruction of the enforcement of the criminal laws of a state, without more, is a power reserved to the states. The enforcement of a state's criminal laws necessarily concerns only local or state matters. Thus, the obstruction of said enforcement would constitute a purely local or state offense which, according to the applicable principles discussed above, would require local or state prosecution. As Mr. Justice Stewart, dissenting, wrote in *Perez v. United States,* 402 U.S. 146, 159, 91 S.Ct. 1357, 1363 (1971):

> "The definition and prosecution of local intrastate crime are reserved to the States under the Ninth and Tenth Amendments."



**D.**

**The power to prohibit a conspiracy to obstruct the enforcement of the criminal laws of a state, or political subdivision thereof, without more, is a power reserved to the states under the Tenth Amendment, and not a power delegated to Congress under Article I, Section 8 of the United States Constitution.**

Petitioner maintains that the power to prohibit a *conspiracy to obstruct* the enforcement of a state's criminal laws is a power reserved to the states. If the federal government has no power to prohibit the *substantive offense* of said obstruction, then it can have no power to prohibit a *conspiracy* to commit the offense. If the power to define and prosecute the *substantive offense* of said obstruction rests with the states, then the power to define and prosecute a *conspiracy* to commit the offense rests with the states. Therefore, the first part of the statute at issue, 18 U.S.C. §1511, which declares that "[i]t shall be unlawful for two or more persons to conspire to obstruct the enforcement of the criminal laws of a State or political subdivision thereof . . .", does not in and of itself define an illegal act under federal law.

**E.**

**The mere intention to facilitate an illegal gambling business can not so affect interstate commerce as to afford Congress the power to prohibit such intention when it is coupled with a purely local act or acts.**

The second part of the statute at issue, 18 U.S.C. §1511, adds the phrase ". . . with the intent to facilitate an illegal gambling business . . .". Quaere: does federal jurisdiction attach as a result of the inclusion of these words? Petitioner would argue that the mere *intention* to facilitate an illegal gambling business can not so affect interstate commerce as to afford Congress the power to prohibit such intention when it is coupled with a purely local act or acts. "Intent" is defined as "design, resolve, or determination with which a person acts". Black's Law Dictionary, 4th Ed. Rev. at 947 (1968). Accordingly, "intent" only refers to a manner or design with which one conducts himself. Alone, it is not an offense, federal or state; neither Congress nor a legislature can prohibit "intent". Moreover, here "intent" has no connection whatsoever with "interstate commerce"; it does not and can not affect interstate commerce. The Congressional attempt to wed these concepts by reciting, via statute, the phrase ". . . with the intent to facilitate an illegal gambling business . . ." does not establish such a condition that federal jurisdiction is evoked.

It is clear from the legislative history of 18 U.S.C. §1511 that this statute was conceived to reach ". . . those corrupt State and local officials who make it possible for them (major gambling figures) to function". H.R. Rep. No. 91-1549, 91st Cong. 2d Sess. (1970); 2 U.S.



Code Cong. & Admin. News 1970 at p. 4029 (hereinafter referred to as "House Report"). However, the statutory language is not concerned with officials "who make it possible" for illegal gambling businesses to operate. By use of the words "with the intent to", Congress does not require proof that an illegal gambling business was facilitated as a result of a conspiracy to obstruct the enforcement of state or local criminal laws. The officials need not have acted to facilitate or make possible the functioning of an illegal gambling business even though the House Report indicates that more than mere intent must be shown. Therefore, in Petitioner's view, 18 U.S.C. §1511 does not embody the original legislative concept. The statute does not mirror the stated Congressional purpose; in fact, the two are in conflict.

**F.**

**The power to prohibit a conspiracy to obstruct the enforcement of the criminal laws of a state with the mere intent to facilitate an illegal gambling business to which Congress has assigned an interstate nexus is a power reserved to the states under the Tenth Amendment, and not a power delegated to Congress under Article I, Section 8 of the United States Constitution.**

Based on the preceding premises, it follows that the power to prohibit a conspiracy to obstruct the enforcement of a state's criminal laws, even when the conspiracy is intended to facilitate an illegal gambling business to which Congress has assigned an interstate nexus, is a power reserved to the states. As discussed above, "mere intent" alone is meaningless as it pertains to criminality. Even coupled with "to facilitate an illegal gambling business", mere intent does not provide an adequate "commerce power" handle to which the federal government can hold. Without such a handle, the offense must be regarded as purely local; thus the power is in the states.

In reviewing the above contention of Petitioner, it is respectfully suggested that this Court employ the standard set forth in *Katzenbach v. McClung,* 379 U.S. 294, 303-304, 85 S.Ct. 377, 383 (1964):

> ". . . [W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."



Applying this standard to the instant matter raises the crucial question of whether or not there is a rational basis for finding that prohibiting a conspiracy to obstruct the enforcement of local criminal laws with the intent to facilitate an illegal gambling business is necessary to the protection of commerce. Petitioner urges that Congress had no rational basis for answering this question affirmatively, for such a conspiracy, without more, does not have a sufficient affect on interstate commerce. It has been recognized that a major gambling business does affect interstate commerce; and, if the business itself is proscribed by statute, an adequate interstate commerce nexus exists so that the statute passes constitutional muster. Eg., *United States v. Harris,* 460 F. 2d 1041 (5th Cir. 1972), cert. denied 409 U.S. 877, 93 S.Ct. 128. But, under 18 U.S.C. §1511 as written, it is not necessary to demonstrate that a conspiracy to obstruct local law enforcement facilitated an illegal gambling business. Nor is it necessary to show that certain acts were undertaken by local officials to further an illegal gambling business. Accordingly, without a showing that the conspiracy had an affect on an illegal gambling business, it cannot be said that the conspiracy itself provides an adequate nexus with interstate commerce. The addition of the element "intent" does nothing to alter this fact.

At this juncture, an excerpt from Mr. Justice Black's concurring opinion in *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 85 S.Ct. 348 (1964) is significant. There, it was explained:

> ". . . [T]his Court has steadfastly followed, and indeed has emphasized time and time again, that Congress has ample power to protect interstate com-

> merce from activities adversely and injuriously affecting it, which but for this adverse effect on interstate commerce would be beyond the power of Congress to regulate." 379 U.S. at 272, 85 S.Ct. at 365.

Here, a conspiracy to obstruct local law enforcement with the mere *intent* to facilitate illegal gambling would not adversely and injuriously affect interstate commerce. Thus, such a "local" conspiracy is beyond the power of Congress to regulate.

Petitioner urges that a contrary view would compel the acceptance of the logical extreme that Congress can legislate concerning *any* activity by simply relying on the power of the Commerce Clause. However, it is plain that there are constitutional limitations upon the use of that power. *Gibbons v. Ogden, supra.* As Mr. Chief Justice Hughes wrote in *National Labor Relations Board v. Jones and Laughlin Steel Corp.,* 301 U.S. 1, 37, 57 S.Ct. 615, 624 (1937):

> "Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. *Schechter Poultry Corp. v. United States,* 295 U.S. 495, 55 S.Ct. 837 (1935). The question is necessarily one of degree."

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## CONCLUSION

For the reasons discussed above, Petitioner contends that 18 U.S.C. §1511 is unconstitutional on its face because the power to prohibit a conspiracy to obstruct the enforcement of the criminal laws of a State or political subdivision thereof with the intent to facilitate an illegal gambling business is a power reserved to the States by the Ninth and Tenth Amendments to the United States Constitution and is not a power delegated to Congress under Article I, Section 8 of the Constitution.

Therefore, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

THOMAS A. LIVINGSTON, ESQ.
Attorney for Petitioner

DENNIS J. CLARK, ESQ.

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## APPENDIX A

(1)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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NO. 74-1746

---

UNITED STATES OF AMERICA
v.
FRANK BRUNO,
Appellant

---

On Appeal from the United States District Court
for the Western District of Pennsylvania
Crim. No. 74-109
Argued February 4, 1975
Before: KALONDER, ADAMS and ROSENN, *Circuit Judges*

---

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**Judgment Order**

After considering the contentions raised by appellant, namely that (1) the evidence was not sufficient to sustain the verdict; (2) 18 U.S.C. §1511 has been uncon-

stitutionally applied to defendant under the circumstances of this case; (3) the trial judge abused his discretion by refusing to grant defendant's motion for a mistrial; and (4) it was error not to grant a mistrial because the prosecutor's opening and closing arguments were improper, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,
ARLIN M. ADAMS
Circuit Judge

ATTEST:
THOMAS F. QUINN
Clerk

Dated: February 5, 1975

Certified as a true copy and issued in lieu of a formal mandate on May 19, 1975.

Test: THOMAS F. QUINN

Clerk, United States Court of Appeals
for the Third Circuit

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(2)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

No. 74-1746

---

UNITED STATES OF AMERICA
v.
FRANK BRUNO,
Appellant

---

**Sur Petition for Rehearing**

---

Present: SEITZ, KALODNER, VAN DUSEN, ADAMS, GIBBONS, ROSENN, HUNTER and GARTH, *Circuit Judges*

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The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

ARLIN M. ADAMS

.....
Circuit Judge

Dated: May 9, 1975

## APPENDIX B

### Certificate of Service

Petitioner, Frank Bruno, by his attorneys, Thomas A. Livingston, Esq., and Dennis J. Clark, Esq., hereby certifies that the within Petition for Writ of Certiorari has been forwarded by mail to and filed with the Clerk of the Supreme Court of the United States in Washington, D.C., and that a true and correct copy of said Petition has been served by mail upon the Office of the Solicitor General of the United States, Department of Justice, Washington, D.C.

THOMAS A. LIVINGSTON
DENNIS J. CLARK

Attorneys for Petitioner